No. 77-448

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

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NATIONAL AIRLINES, INC.,
*Petitioner,*

v.

CIVIL AERONAUTICS BOARD, *et al.*,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## BRIEF FOR RESPONDENT PAN AMERICAN WORLD AIRWAYS, INC., IN OPPOSITION

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## QUESTION PRESENTED

Whether the Court of Appeals, having found that the Civil Aeronautics Board committed error in unfairly updating an evidentiary record as between two applicants in selecting a carrier for route authority, erred in remanding only that part of the Board's decision.

## STATEMENT OF THE CASE

In its decision in the *Miami-Los Angeles Competitive Nonstop Case*, the Civil Aeronautics Board affirmed the finding of its Administrative Law Judge that the Miami-Los Angeles market requires competitive nonstop service, but refused to follow the Law Judge's recommendation that the authority in issue be awarded to Pan American World Airways, Inc. (Pan American) and selected Western Air Lines, Inc. (Western) instead. Pan American sought judicial review of the Board's decision to select Western. Petitioner National Airlines, Inc. (National), the incumbent nonstop carrier in the market, also sought judicial review, challenging the Board's determination to certificate any competition.

Before the Court of Appeals, Pan American contended that the Board's reversal of its Law Judge's recommendation as to carrier selection was based upon an unfair and prejudicial updating of the evidentiary record. Among other things, Pan American argued that the Board had unfairly and arbitrarily adjusted Pan American's forecast of traffic and financial results based upon post-record occurrences, but had not made necessary adjustments to Western's forecasts.

National's principal argument centered around its contention that events which occurred during the period between the closing of the evidentiary record and the Board's decision eliminated any evidentiary basis for concluding that National and Western could operate profitably in competition with each other. In its opinion, the Board updated the traffic forecasts based upon more recent, officially noticeable data. It found that, with competition, National would have a load factor of 44.5 percent, well in excess of National's own estimate of its break-even load factor, and that National had not presented any probative evidence that its break-even load factor had increased. App. C-15-17.



The Court of Appeals held that the Board's selective updating of the evidentiary record with respect to the comparative qualifications of Pan American and Western had been prejudicial and unfair to Pan American, and on that basis remanded the record "for adversarial exploration of the recent developments considered by the Board in reaching its decision to prefer Western over Pan American." App. A-42. While noting that National also challenged the Board's updating of the record, on the facts of the case the Court could not find that National was "injured in any way." App. A-29.

## REASONS FOR DENYING THE WRIT

1. National suggests that the Court of Appeals ignored errors in the Board's decision prejudicial to National simply because the Court agreed with the Board's finding that competition is warranted. This suggestion is without support. Such an improper motivation does not appear on the face of the opinion, and it should not be imputed either by National or by this Court. What the Court of Appeals found, in fact, was that the Board's decision as to the need for competition was supported by substantial evidence.

2. National contends that the Court of Appeals' remand is unduly restrictive and will prevent the Board from permitting National to relitigate the need for competition issue. At the outset it should be noted that National's petition is, in all likelihood, moot. The CAB adopted an order on September 16, 1977, inviting comments from the parties with respect to the scope of the remanded proceeding and the procedures to be used. As to the issue of whether competition should be authorized, the Board stated that "[t]he Court did not require a reexamination of the need for service question and we see no public need for it." CAB Order 77-9-62.[1] This ac-

[1] Order 77-9-62 is attached to this brief as an Appendix. The quoted language appears at page 3a of the Appendix.

tion is consistent with the Board's policy of declining to reopen issues other than those specifically remanded ". . . unless compelling public interest or other considerations are advanced for such reexamination." *St. Louis-Southwest Service Case*, 31 C.A.B. 377, 378 (1960). Any other policy would produce needless relitigation of issues correctly decided in the first instance. Thus, even if the Court of Appeals had given the CAB the discretion which National says should have been given, the result would have been no different.

3. National's reliance on *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, is misplaced. In the present case, unlike *Pottsville*, the Court of Appeals' remand does not deprive any competing applicants of a fair comparative hearing. All applicants have been heard contemporaneously. All that the remand requires is that the Board decide anew between Pan American and Western because Pan American was denied a fair comparative hearing.

4. Furthermore, unlike the statute involved in *Pottsville*, the Federal Aviation Act provides the courts of appeals with broad remand powers. Section 1006(d) of the Federal Aviation Act, 49 U.S.C. § 1486(d), provides that courts of appeals "shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board." The District of Columbia Circuit routinely remands cases to the Board with instructions, and has stated that "[t]he decision whether or not to limit the scope of the proceedings on remand involves the sound discretion of the reviewing court." *Braniff Airways, Inc.* v. *CAB*, 379 F.2d 453, 468 (D.C. Cir. 1967) (citing cases; footnote omitted).



## CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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October 1977

**APPENDIX**

Order 77-9-62

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD

Washington, D.C.

[SEAL]

Adopted by the Civil Aeronautics Board
at its office in Washington, D.C.,
on the 16th day of September, 1977

Docket 24694

MIAMI-LOS ANGELES COMPETITIVE NONSTOP CASE

ORDER REOPENING PROCEEDING

*Background*

On March 15, 1976, the Board issued its decision in this case authorizing Western Air Lines to compete with National Airlines over a Miami-Los Angeles nonstop route. In so doing, the Board affirmed the decision of the administrative law judge that the market needs, and can support, competitive service. The Board, however, reversed the judge's selection of Pan American as a competitive carrier.[1] Requests for reconsideration and stay of that decision were denied on June 16, 1976.[2]

The Board's decision was appealed to the United States Court of Appeals for the District of Columbia Circuit by National, Pan American, and two other losing applicants, Delta Air Lines and American Airlines. On

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[1] Order 76-3-93.

[2] Order 76-6-120.

June 23, 1977, the court issued its decision and remanded the record in the case to the Board "for adversarial exploration of the recent developments considered by the Board in reaching its decision to prefer Western over Pan American. . . ." *Delta Air Lines, Inc. et al.* v. *C.A.B. (Miami-Los Angeles Route)*, No. 76-1241 *et al.* (D.C. Cir., filed June 23, 1977), slip opinion p. 42. The court was concerned that substantial delay had occurred between the close of the record and the issuance of the Board's decision, that Pan American had persuasively argued that the Board's updating of the record had operated significantly to the detriment of that carrier, and that the Board's consideration of beyond-segment services as a carrier selection criterion may have constituted a departure from its 1969 decision involving the same market. Specifically, the court directed the Board to "give Pan American a chance to submit its own version of changes in circumstances occurring between 1973 and 1976 and to comment upon the relevance of those changes to the award of Miami-Los Angeles route authority." Id. at 28.

In all other respects the Board's decision was upheld. The court observed that of the various contentions pressed upon it, only three warranted discussion and concluded that, as to two of the contentions—namely, Delta's argument that it was entitled to priority by reason of its 1972 merger with Northeast Airlines, and National's challenge to the Board's alleged failure to comply with the Energy Policy and Conservation Act of 1975—the Board's disposition should not be disturbed. Id. at 3-4. National Airlines filed a petition for a stay of the court's decision pending rehearing *en banc* or the filing of a petition for certiorari. On August 2, 1977, the court denied National's requests, saying:

> "It is also desirable that the proceedings on remand be carried on as expeditiously as possible, as the Board represents its purpose to do." *Delta Air Lines, Inc.* v. *CAB*, No. 76-1241 (D.C. Cir., filed August 2, 1977).[3]



*Discussion*

We have decided to solicit comments from all parties with respect to the proper course of action for the Board to follow in light of the court's remand.[4] In order to focus the comments, we believe it useful to set forth two specific questions on which the Board wishes comments.

First, we want parties to comment on the scope of the remand required by the court's decision. The court did not require a reexamination of the need for service question and we see no public need for it. As to the carrier selection question, we note that the court's decision appears to have directly required only that the Board "give Pan American a chance to submit its own version of changes in circumstances occurring between 1973 and 1976 and to comment upon the relevance of those changes to the award of Miami-Los Angeles route authority." *Delta Air Lines, Inc. et al.* v. *(C.A.B. Miami-Los Angeles Route), supra*, slip opinion p. 28.[5] We wish the parties to address the Board's power to reopen the

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[3] The Court's mandate was issued on August 9, 1977. A copy of the Court's August 2 order is attached.

[4] On July 1 and July 18, Eastern Air Lines filed motions urging the Board to reopen the case for further evidentiary hearings on new applications from all carriers and to hold such hearings in Miami. Answers to Eastern's motions are due shortly.

[5] We assume that this directive includes according Western a reasonable opportunity to submit its version of recent events as well. We note, however, that the court, in discussing the general question of the updating of the record, observed that both National and Pan American challenged this updating. The court, however, rejected National's claim that it had been prejudiced and did not require the Board to accord National (and presumably others) an opportunity for a further presentation to the Board. See slip opinion, n. 29, note 15.

case for a *de novo* examination of the question of carrier selection where the court remands only the record. Our tentative view is that this would be neither necessary nor desirable. The Board's original decision makes clear our opinion that, from the perspective of the traveling and shipping public, no carrier appears likely to provide appreciably better service than Western or Pan American.[6] Furthermore, it must be recognized that this matter has already occupied our attention for about a decade, and that a commitment of Board resources to a re-trial of this case would necessarily compromise the Board's concurrent ability to emply [*sic*] these same resources to examine the needs of other markets as well as other novel and important regulatory matters now facing the Board for the first time. Nonetheless, we do not foreclose a fuller reexamination of the carrier selection question if warranted.[7]

Second, whether this case is limited to the question of carrier selection as between Western and Pan American (or, perhaps, an award to both), or is more broadly reviewed, we wish the parties' views as to whether the Board could or should proceed under an expedited schedule which would eliminate a new trial and a new initial decision. In the *Service to Saipan Case*, Docket 24421, and the *Service to Richmond Case*, Docket 24412, the Board entertained evidentiary exhibits, rebuttal material, and briefs, but did not hold a further oral evidentiary hearing or require the filing of an initial decision. The

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[6] See Order 76-3-93, pp. 19-22. The court will allow Western's continued operation during the pendency of any remand proceeding and we recognize that, as a result, the traveling and shipping public will not be deprived of needed service during the pendency of any remand.

[7] Eastern Air Lines has filed a request that the Board reopen the entire carrier selection issue and hold further hearings in Miami. Pan American has filed an answer in opposition; answers were due September 9, 1977.



Board was able to complete the *Saipan* case in under six months and was able to complete the *Richmond* case in just over four months. See Order 75-11-59, served November 17, 1975, and Order 76-6-171, decided May 7, 1976 (*Saipan*); and Order 76-11-131, served November 30, 1976, and Order 77-4-29, decided April 6, 1977 (*Richmond*).

ACCORDINGLY, IT IS ORDERED THAT: Comments in response to this order shall be filed within 14 days from service and reply comments shall be due 7 days later.

By the Civil Aeronautics Board:

PHYLLIS T. KAYLOR
Secretary

[SEAL]

All Members concurred.